IN THE

Supreme Court of the United States

OCTOBER TERM, 197..

No. 77-4

IN RE SUGAR ANTITRUST LITIGATION
(MDL No. 201)

THE AMALGAMATED SUGAR COMPANY, AMSTAR CORPORATION, CALIFORNIA BEET GROWERS ASSOCIATION, LTD., THE GREAT WESTERN SUGAR COMPANY, AND U AND I INCORPORATED,
Petitioners,

VS.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent.

ANTHONY J. PIZZA FOOD PRODUCTS CORPORATION, et al.,
(Civil No. C75-1123, et al.)
Real Parties in Interest.

REPLY TO BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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This brief is filed in response to the Brief on Behalf of Real Parties in Interest in Opposition to Petition for Writ of Certiorari to the United States

Court of Appeals for the Ninth Circuit (hereafter "R.P. Br."), in order to demonstrate that nothing contained in that Brief is responsive to petitioners' basic contention, that intervention by this Court is required to clarify the standards to be applied by federal judges in ruling upon motions to disqualify brought under the recently amended Section 455(a) of the Judicial Code and the other significant disqualification statute, 28 U.S.C. § 144.

I. Contrary to the Contention of the Real Parties in Interest, the Decision of the District Court Is Inconsistent with This Court's Decision in *Berger v. United States*.

The real parties in interest (plaintiffs below) assert that the district court followed this Court's decision in *Berger* v. *United States,* 255 U.S. 22 (1921), by "accepting [petitioners'] allegations as true." (R.P. Br. 15.) This assertion is flatly contradicted by the record. In fact, Judge Boldt ignored entirely many of petitioners' factual allegations, especially those involving his *ex parte* communications with opposing counsel,[1] and rejected others as false.[2]

[1] The *ex parte* communications ignored by Judge Boldt in his Memorandum Decision below include (1) his conversation with Mr. Ferguson concerning transfer of the *1812* case (Pet. 6); (2) his communications with Mr. Ferguson concerning appointment of Mr. Ferguson as permanent Chairman of Plaintiffs' Steering Committee (Pet. 7); and (3) his conference with Mr. Ferguson concerning class action procedures and scheduling (Pet. 7). Judge Boldt briefly acknowledged, but did not attempt to explain or justify, his *ex parte* telephone conversation with Mr. Ferguson concerning the Holly settlement and other prospective settlements (Petitioners' Appendix 11a-12a).

[2] The respects in which Judge Boldt expressly rejected petitioners' factual allegations are set forth in the Petition, p. 18.

In an attempt to justify Judge Boldt's improper treatment of petitioners' allegations, the real parties in interest concede that he "did not write a lengthy opinion setting forth all the relevant facts and law," but argue that he had no obligation to do so. (R.P. Br. 16, n.1.)[3] Judge Boldt's failure to set forth or consider the facts involving his *ex parte* communications is especially significant, however, since had he properly considered them, he would have had no alternative but to find in them more than adequate support for petitioners' charge of bias and prejudice and their conviction that his impartiality had reasonably been questioned. Petitioners submit that no explanation could allay the fear of prejudice aroused by *ex parte* communications between a district judge and the Chairman of Plaintiffs' Steering Committee, his close personal friend, with respect to matters of substance in the litigation.

It is not true, as the real parties in interest assert, that petitioners "allege that the district court's personal friendship with one of plaintiffs' counsel supports charges of impropriety, personal bias, and prejudice." (R.P. Br. 21.) It is not Judge Boldt's personal friendship with Mr. Ferguson, but rather the continu-

[3] While an exhaustive opinion may not be necessary in all cases seeking disqualification, a more complete and comprehensive opinion is clearly required where, as here, the factual allegations are serious and detailed, the legal issues significant and complex, and plaintiffs seek hundreds of millions of dollars in a massive multidistrict antitrust class action proceeding involving several hundred parties. We would suggest that the Court contrast Judge Boldt's Memorandum Decision below (Petitioners' Appendix 10a-13a) with the comprehensive and scholarly opinion of Judge Hemphill in Duplan Corp. v. Deering Milliken, Inc., 400 F. Supp. 497 (D.S.C. 1975).

ing *abuse* of that friendship in a series of *ex parte* communications, that supports petitioners' charges.

As the district court below failed to discuss or justify these *ex parte* contacts, so do the real parties in interest ignore them in their brief. They assert, in that portion of their brief in which they contend that petitioners have failed to show bias, prejudice, or impropriety, that "*not one* of Petitioners' allegations substantiates charges that the district court's impartiality can reasonably be questioned." (R.P. Br. 20.) Yet the *ex parte* contacts described above, as well as Judge Boldt's misstatements of fact and the other factual allegations set forth in the Petition (pp. 4-14), clearly justify petitioners' charges. Those contacts, like the improper *ex parte* conversation between a district judge and his brother in another recent disqualification case, create "an impression of private consultation and appearance of partiality which does not reassure a public already skeptical of lawyers and the legal system." *SCA Services, Inc.* v. *Morgan,* No. 77-1194, slip op. at 10 (7th Cir. June 17, 1977).

II. The Contention That Petitioners' Motion and Affidavits to Disqualify Were Untimely Filed Is Without Merit.

The real parties in interest oppose granting of the petition on the ground that the motion and affidavits of bias and prejudice below were not timely filed (R.P. Br. 22), an argument made in the district court, but neither accepted by the district court nor addressed by the court of appeals. In fact, the motion and affidavits below were timely filed.

It was the cumulative impact of a series of events which compelled petitioners to file the motion and

affidavits below. The two events which triggered the filing below occurred on August 25 and September 9, 1976.[4] Shortly thereafter, counsel for the petitioners conferred and determined to inform Judge Boldt promptly of their decision to file a motion to disqualify and accompanying affidavits. On September 13, 1976, petitioners attempted to arrange a conference with the court and liaison counsel for plaintiffs on either September 15 or September 16 in order to present this matter to Judge Boldt and to ask that all proceedings be suspended until filing could be accomplished. In fact, this presentation was made on September 23, 1976. The motion to disqualify and the accompanying affidavits were filed on October 18, 1976.

Even assuming *arguendo* that the affidavits were not filed in timely fashion, that fact would not affect the propriety of consideration of the disqualification issue by Judge Boldt or by this Court, since the motion to disqualify was also brought under 28 U.S.C. § 455 (a), which has no timeliness requirement. As the Sixth Circuit recently held in rejecting a similar timeliness argument in *SCA Services, Inc.* v. *Morgan,* slip op. at 11-12:

> "The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed 'that confidence in the impartiality of federal judges is enhanced by a more strict treat-

[4] These were the statement in Judge Boldt's pretrial order of August 25, 1976 asserting his lack of familiarity with the terms of the settlement agreement prior to his determination of class motions, and his misstatements on the record in the Fertilizer Cases on September 9, 1976 concerning his lack of knowledge of the settlement agreement. (Petition 10-13)

ment of waiver.' They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. Moreover, although the Department of Justice recommended that the new section 455 should include some limitation of time 'to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before,' (H.R. Rep. No. 1453, 93d Cong., 2d Sess. 9 (1974)), Congress did not incorporate this recommendation in the statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit." (Footnotes omitted)

III. The Contention That Intervention of This Court Is Not Required To Clarify a Controlling Issue of Law on Which There Is a Conflict of the Circuits Is Without Merit.

The real parties in interest dispute petitioners' reading of *Parrish* v. *Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *United States* v. *Ritter*, 540 F.2d 459 (10th Cir.), *cert. denied*, —— U.S. ——, 97 S.Ct. 370 (1976); and the Memorandum Decision of Judge Boldt below. We are confident, however, that a careful reading of these decisions will demonstrate that sufficient conflict and confusion exist with respect to the proper standards to apply under amended 28 U.S.C. § 455(a) to require prompt clarification by this Court.

An analysis of the judicial interpretations of amended Section 455(a) reveals considerable uncertainty as to the amendment's effect. Unless definitive

action is taken by this Court, this uncertainty will continue to undermine the congresional effort to amend Section 455(a) so as to "broaden and clarify the grounds for judicial disqualification."[5]

In *Parrish* v. *Board of Commissioners*, three different standards were proposed by various members of the court as appropriate for use in deciding motions under § 455(a). The majority appears to have adopted a test that focuses on whether the facts support a reasonable inference of impartiality, a requirement that is tantamount to requiring a showing of bias in fact. (524 F.2d at 103-04.) Judge Brown, specially concurring, felt that the statute requires a court to determine whether "a reasonable person could reasonably have a belief of bias." (524 F.2d at 104.) Finally, Judge Tuttle, in dissent, argued that the test should be whether "the facts be such, their truth being assumed, as to convince a reasonable man that the affiant reasonably believed that bias exists." (524 F.2d at 108.) These various opinions are the source of divergent lines of cases following the majority[6] and minority positions. The leading case to follow the more liberal approach to the amended statute taken by Judge Tuttle and Judge Brown is *United States* v. *Ritter*.[7]

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[5] H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 2 (1974); S. Rep. No. 93-419, 93d Cong., 1st Sess. 2 (1973).

[6] Cases which appear to adopt the approach of the majority in *Parrish* include United States v. Cowden, 545 F.2d 257, 265 (1st Cir.), *cert. denied*, —— U.S. ——, 97 S.Ct. 1181 (1977); United States v. Dodge, 538 F.2d 770, 782 (8th Cir. 1976), *cert. denied sub nom.* United States v. Escamilla, —— U.S. ——, 97 S.Ct. 1119 (1977); and Bradley v. Milliken, 426 F. Supp. 929, 933-35 (E.D. Mich. 1977).

[7] Other cases appearing to follow the liberal minority approach

The district court below appears to have adopted an extreme version of the approach of the *Parrish* majority, applying a "subjective" test of whether *he himself* believed that there was a "reasonable" basis for his disqualification. Unfortunately, Judge Boldt did not cite or discuss either the relevant statutes or any of the cases decided thereunder in his Memorandum Decision. The absence of clarity and of legal analysis in the opinion below should not prejudice petitioners in this Court, but rather should serve to underscore the need for this Court's intervention. In this way alone may this Court assure fulfillment of the intent of Congress in strengthening the disqualification provisions applicable to the federal judiciary in the 1974 amendments to Section 455(a).

* * *

In conclusion, this Court should grant the petition in order to:

(1) reaffirm its holding in *Berger* that a federal judge who is asked to disqualify himself must accept as true the factual allegations upon which the application is based, whether disqualification is sought under Section 144 or amended Section 455(a);

(2) establish that the test to be applied under Section 455(a) is an "objective" test of whether a reasonable man would conclude that a person in the position of the moving party might reasonably question the impartiality of a federal judge, rather than a "subjective" test of the judge's own evaluation of whether bias or prejudice in fact exists; and

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are Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977), and Spires v. Hearst Corp., 420 F. Supp. 304, 306-07 (C.D. Cal. 1976).

(3) affirm that the "duty to sit" may not properly be invoked by a federal judge in deciding motions brought under Section 455(a).

CONCLUSION

For the reasons set forth above we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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